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The Patent Law
and
Its Administration
as
Aids to Monopoly

By MURRAY CORRINGTON
of the New York Bar

A frank criticism of the methods and practices of our Federal Courts, and their deadening influence upon the spirit of independent and progressive invention

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FOREWORD

THIS pamphlet has been prepared primarily for the purpose of setting before the public and its representatives in Congress the facts concerning the great numbers of independent inventors who are not in the employ of the large manufacturing concerns, which make it impossible for them, in the present state of the patent law and its administration in the federal courts, to protect their inventions from appropriation; and in the hope that, these facts being known, such modifications in the law and its administration may be brought about as will enable those inventors to protect their inventions and secure the

rewards to which their labors entitle them, and of which the law should afford them assurance.

While the pamphlet has been copyrighted, this has not been done with any view to profit from its publication. Permission is therefore given to editors of newspapers and magazines to quote such portions of its contents as they may desire in commenting upon the situation disclosed therein, and they are requested to coöperate in such manner and to such extent as they may feel disposed in giving the facts publicity and in advocating desired reforms in the law, to the end that they may thus aid in securing protection and justice for those independent inventors in whose behalf the pamphlet has been written; and they will at the same time assist in placing those inventors in position and giving them the necessary encouragement to enable them to render the public far greater benefits than heretofore possible through the increasing numbers of their inventions.

To a possible objection on the part of some readers that the writer has not in all instances given the names of the cases, the courts and the judges referred to, a reminder of the power of federal courts and judges to summarily deal with those who criticize their conduct or attempt to expose their wrong-doing, by the infliction of penalties as for contempts or by disbarment, as set forth in the pamphlet, must be a sufficient answer.

THE Constitution of the United States provides (Art. 1, Sec. 8) that Congress shall have power:

"To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

In accordance with this authority, Congress has from time to time, beginning in 1789, passed various laws setting forth the necessary steps to be taken by inventors to secure protection for their inventions, and the restraint of and damages for the infringement of their rights. The formal document which the government issues to an inventor for the protection of his invention is called "Letters-Patent," or, by common speech, a "Patent."

For several decades after the patent system was established patents for inventions were issued through the office of the Secretary of State, but in 1836 Congress passed the act creating the Patent Office and placed in charge thereof a Commissioner of Patents and a corps of expert assistants who carefully examine all applications for patents and issue the same when the applicants are found to be entitled thereto, all patents running for the period of 17 years from the dates of their issue.

As soon as an inventor brings his invention to such state of perfection that he feels warranted in having the same patented, he may file an application for a patent thereof in the Patent Office, in which he must explain the invention in detail and illustrate the same by drawings if that be practicable. While he may do this work himself, it is far better to have it done by an attorney who has had experience both in the preparation and prosecution of applications for patents, and also in patent litigations in the courts. The application is referred to one of the forty odd classified divisions of the Patent Office, according to the subject-matter of the invention, where the examiner in charge of that division and his assistants, who have become experts by years of special study of the particular art to which the invention relates, carefully examine the application and compare the alleged invention described therein

with all portions of the prior art that are disclosed in other patents and publications, and if they find nothing to warrant a rejection of the application, because the alleged invention is not new, or to require amendments and a narrowing of the claims of invention, approve the application as filed, and allow the patent to issue without amendment. Where the inventor's counsel differs with the examiner in charge as to the justice either of rejecting the application or of requiring amendments, appeals may be taken and the questions determined ultimately by the Court of Appeals of the District of Columbia. If it be found that the invention described in a given application is substantially the same as that described in a pending application of another inventor, or that described in a recently issued patent, a proceeding known as an "Interference" may be instituted between the applications, or between the application and the patent, to determine who first made the invention, and who shall be entitled to a patent therefor, and of these proceedings we shall speak further.

Under the patent law a patent may be issued to one who has discovered any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement thereof. Most patents are issued for improvements in mechanical apparatus of various kinds. The invention may be a wholly novel construction or device, which is rarely the case, or it may be any novel and useful improvement upon some existing device. Patents on mechanical devices are almost invariably for what is known as new combinations of mechanical elements. If an inventor devises a new mechanical apparatus, or if he can add some mechanical device or attachment to coöperate with an existing apparatus and thereby produce or effect a new and useful result which the old apparatus could not produce, he has made a new combination and may obtain a patent therefor, although his new apparatus may infringe a patent on the earlier apparatus of which his is an improvement. Or if he can take an existing combination of mechanical parts or elements and rearrange those elements into a new combination that will give a better result or

some new and additional result that could not be effected by the old combination, he may have a patent for his new combination. Again, if he can take an old combination of mechanical elements or parts, consisting, for instance, of elements A, B, C, D, and E, and by eliminating one or more of the elements or parts, such as E, or D and E, so rearrange the remaining elements as to effect all the results of which the more complicated structure was capable (and possibly additional results), he may receive a patent for this new combination which simplifies and cheapens the apparatus.

Since our patent system was established in 1789 it has experienced a growth and development of consecutively increasing importance, resembling somewhat a geometrical progression. During the first half century of its existence (1789-1839) approximately 11,421 patents were issued; during the next half century (1839-1889) approximately 417,201 were issued; and during the last 20 years approximately one and one-half times as many patents have been issued as were issued during the preceding 104 years since the system was established, bringing the total number of issued patents to considerably above 1,000,000.

The relation of patents to manufacturing is both intimate and important, and this intimacy and importance have likewise increased with the growth of the patent system. Many of the most important manufacturing establishments were originally organized for the purpose of developing and marketing new inventions, which could not have been organized unless the inventions had been patented, nor unless the organizers had believed that the patents were sufficient to insure them the monopoly intended to be secured during the lifetime of the patents. After a concern gets fairly established in the manufacture of a given line of apparatus, especially if that apparatus be more or less complicated and involves delicate adjustment and operation, it is necessary for its managers to be constantly on the lookout for all improvements upon that apparatus that may be devised and to secure control of and patents upon as many of such improvements as possible, lest rivals having a su-

perior apparatus appear in the field. It is the usual custom for large manufacturing companies to require their employees to turn over to them all inventions and improvements relating to their manufactures that are made by the employees during their employment; and in such cases all expenses of procuring the patents for such inventions and maintaining the rights secured thereby are borne by the employing companies. But a different situation arises when the invention is that of an independent inventor who is not connected with any established concern and who strives to obtain a patent for his invention, to maintain his independence and protect the rights secured by his patent. It is of the systematic and organized efforts of the wealthy and powerful manufacturing corporations to appropriate the inventions of these independent inventors and of their utter inability to prevent such spoliation of their property, owing to the cumbrous and expensive proceedings in the federal courts, which they must invoke, and to the usual incompetency, and sometimes indifference and unfairness or favoritism, of the judges who preside in some of those courts, that we desire here to speak.

In order that the reader may have a clear understanding of these matters, we shall describe the actual experiences and difficulties which an independent inventor encounters who, having made a meritorious invention, proceeds to patent the same and then strives to maintain his rights under his patent and prevent the appropriation of his invention either before or after the patent is issued; and, while all of the experiences which we shall relate have not necessarily befallen any one inventor, everything which we describe has befallen some independent inventor and has come within the writer's personal observation or experience during his 20 years of intimate connection with the issue of patents through the Patent Office and patent litigation in the federal courts, or is set forth in the reported decisions of those courts.

APPROPRIATING AN INVENTION—BEFORE THE PATENT THEREFOR IS ISSUED

IF the inventor is careful to keep his invention a secret, he can usually obtain his patent without great trouble or expense. Where the invention is one of great importance and one of the large manufacturing combinations engaged in the line of manufacture to which the invention relates obtains a knowledge of it before the patent is issued, the attempts to appropriate the invention often proceed at once without waiting for the patent to issue. Practically all of the large manufacturing corporations have a corps of skilled mechanics, engineers and attorneys in their employ who are constantly on the lookout for opportunities to secure control of inventions made by inventors outside of their employ, and it frequently happens that, if a new and valuable idea is brought to their attention before it has been patented, some of them will file an application for a patent, or amend an application already on file, and secure the declaration of an "interference" in the Patent Office with the application of the independent inventor, if not with any hope of winning that contest and securing a patent for his employers, at least with the purpose of giving his employers that powerful weapon to assist them in securing the invention and patent at their own price, because these interference contests keep the independent inventor under the doubt and anxiety of a possible defeat, postpone at best the issue of his patent for months and sometimes for years, and cause an expense which it is often impossible for him to meet.

In one such instance a large railroad supply corporation obtained knowledge of an invention of independent parties which they were preparing to offer upon the market and its counsel filed amendments to one of its pending applications for the purpose of making the claims of the patent when issued cover the independent invention. As soon as the patent thus broadened was issued, suit was brought thereon by the corporation against its rivals, alleging that the indepen-

dent invention infringed the patent. The trial judge, a man of great ability in patent cases and free from all suspicion of undue influence, denounced this conduct as a transparent attempt to appropriate the property of others, but on appeal to the Circuit Court of Appeals, while his decision was affirmed by two of the three judges, the third judge, who, it may be incidentally remarked, owed his appointment to the influence of large corporation interests and their political allies, was in favor of permitting what the trial judge denounced as an attempted appropriation.

On another occasion an independent inventor consulted one of the large electrical corporations with a view of having his invention introduced by it and was referred by the company's vice-president to its engineers. Before the inventor got his application for a patent filed, these engineers filed in the Patent Office an application for a patent in their own names, claiming the invention as their own. An interference was declared and the patent was finally issued to the independent inventor, but only after an expensive contest of several years' duration in the Patent Office and the Court of Appeals of the District of Columbia.

In another case an inventor, A, took an improvement in typewriters to one of the big typewriter companies and was referred to its superintendent, who reported adversely upon the invention. Shortly thereafter the typewriter company proceeded to make the invention with a view of placing it upon the market independently of A. Meanwhile, another inventor, B, made the same invention, though he was later than A, and he promptly filed his application for a patent in the Patent Office. The first inventor, A, because of the discouragement which he had received from the typewriter company, neglected to follow up the adapting and perfecting of his invention and the filing of an application for a patent therefor, but after some delay he constructed one of his devices and filed his application for a patent. The typewriter company, discovering that B was likely to control the invention to its detriment, thereupon tried to assist A to get his patent and defeat B. An interference was declared in the Patent Office between the applications

of A and B, but the officials decided that the building of A's device by the typewriter company without his knowledge could not inure to his benefit as a reduction to practice of the invention, and that, as A had not been diligent, B was entitled to the patent.

APPROPRIATING THE INVENTION—AFTER THE PATENT IS ISSUED

AS soon as the patent is issued, the fullest knowledge of the invention, including a detailed description of its construction and mode of use, is open to the public, since these matters are, as required by law, carefully set forth in detail in the patent. The Official Gazette (of the Patent Office) is issued on Tuesday of each week and contains a brief notice of each patent and of its subject-matter which is included in that week's issue. The attorneys and experts of the large manufacturing concerns are accustomed to scan each number of the Patent Office Gazette, note the numbers of all patents having relation to their lines of manufacture, and promptly secure copies of such patents as they feel may affect their business or be of interest to them. It is at this point that most of the attempts at appropriation of inventions begin.

If the patent of the independent inventor discloses a mere improvement of no great importance upon an existing apparatus it is not vital as to who owns it. But if it discloses an invention of real and substantial merit and superior to anything theretofore made, the systematic work of appropriating the invention is usually begun by one or more of the corporations already in that line of business and whose profits will be materially affected if this new and superior apparatus is placed upon the market.

The corporation desires to accomplish this appropriation with as little expense as possible, but its managers are prepared to meet any expense that may be necessary. In this work counsel, experts and managers coöperate, and the methods which they employ are usually as follows: 1. They try to induce the inventor to sell his invention and patent

to the corporation at their price, frequently offering him a salary to go into its employ and agree to turn over to it all his future inventions relating to its manufactures. 2. This failing, they try to frighten or force him into accepting their offers by assertions that his new apparatus is an infringement of some old patents already owned by the corporation, and by threats of, or actually bringing, infringement suits against him. 3. If they fail in both these, they attempt to "get around" or "beat" the patent by making some changes in or additions to his invention, and proceed to manufacture and sell the same in defiance of his rights, at the same time offering to intending purchasers of their apparatus a guaranty against damages for infringement and threatening them with suits for damages if they use that of the independent inventor.

In most cases these proceedings on the part of the big corporation are sufficient to enable it to secure possession of the inventor's invention and patent, since they frighten those who would otherwise purchase the new invention from doing so, they frighten the inventor's backers from giving him the financial aid necessary to enable him to manufacture and market his invention, and they necessitate the expenditure of large amounts of time and money by the inventor in defense of his legal rights, which he can do with difficulty, or usually not at all. And experienced counsel will advise him frankly of the almost hopeless task of attempting to maintain his rights under his patent in the federal courts against the power and influence of a wealthy corporation, exerted through channels and in ways known only to the managers of such concerns, guided and aided by shrewd and cunning counsel.

As may be imagined, there are few inventors who have the courage or who can secure the financial assistance necessary to carry through the long contests in the courts for the maintenance of their rights, and this is primarily because the patent law and its administration in the federal courts are such and patent suits are attended with such great delays and expenses that the poor man has no kind of equal chance against the power and influence of the

wealthy corporation. There are instances, however, where the independent inventor declines to be frightened or coaxed into selling out his invention and patent on the terms proposed by the big corporation and insists on attempting to maintain his rights with such ability and means as he can command, and it is more particularly with these independent inventors and with the almost insuperable obstacles which they must overcome that we are here more particularly concerned.

A suit for infringement of a patent may be either an action at law to recover damages, wherein all issues of fact are tried before a jury, or it may be (usually is) a suit in equity to recover damages and profits and also to restrain further infringements, in which case all issues of fact (and of law) are determined by the court without a jury. Ordinarily the details of legal proceedings are uninteresting to the general reader, but it is absolutely necessary to pay attention to such proceedings in specific cases in order to understand how wrong and injustice result in our courts to poor litigants.

While we shall follow the proceedings through the courts as they have been conducted practically since our government was established, we are aware that the Supreme Court has recently promulgated a new set of rules to govern the conduct of equity suits, and that the committee on patents of the House of Representatives has lately rendered a report and introduced a bill with a view of amending the patent law and its administration; but we shall point out near the close of this article that neither the new rules nor the proposed new law will afford independent inventors any substantial assistance, but will in some respects increase the handicaps under which they now labor.

A CASE IN POINT

IN a given instance an independent inventor who had perfected his invention by several years' labor and study of the art to which it related filed his application, procured

his patent and made extensive preparations to place the invention upon the market before he allowed any of the big corporations engaged in that line of business to obtain knowledge of the invention. When the plan and purpose of the invention was first made known it was universally recognized as a radical departure from and improvement upon the art to which it related, provided it was new. There was nowhere to be found, either in prior patents or in the literature of that art, or in the catalogues or circulars of the concerns engaged in that line of business, or in any drawing or in printed or written paper, any reference to, or hint of, the purpose or results for which the invention was devised. The examiner who examined and passed the application in the Patent Office had declared that the whole theory and purpose of the invention showed such a wide departure from the prior art and was so fundamentally new that claims as broad as the inventor desired would be (and were) allowed. As soon, however, as one of the big corporations obtained knowledge of the invention it began the work of appropriation, and we shall follow the efforts of the inventor to maintain his rights and note the actual (not merely possible) results which followed as the facts were developed by the litigation.

Immediately after the issue of the patent copies thereof were obtained and carefully studied by the attorneys and engineers of the corporation. One of the mechanisms made in accordance with the patent was also obtained by them at the earliest practicable time, and after being examined and operated it was taken apart and a full set of drawings of the apparatus was made. The managers of the corporation at first proposed to the inventor through third parties that he and his associates sell his invention and patent to their company for a sum considerably less than the actual cash which had been expended in perfecting the invention and preparing for its manufacture and sale, and also proposed that the inventor go into the employ of the corporation at a salary. These propositions being rejected, they then spread reports among the purchasers, actual and prospective, of the inventor's apparatus that their corporation

would shortly be prepared to furnish new apparatus which would effect all the results of the inventor's apparatus. In order to subject the inventor to annoyance and expense and frighten his financial backers and customers, they next had their attorneys commence suits against the inventor, which were prosecuted no further, alleging that his apparatus infringed some old patents owned by the corporation, and caused knowledge of said suits to be spread among the inventor's customers, at the same time threatening them with suits for damages if they used his apparatus and offering to guarantee them against all claims if they patronized only the corporation. Meanwhile, the engineers and experts of the corporation, with all the knowledge of the inventor's apparatus which they had obtained from a study of his patent and one of his mechanisms, were busily engaged in devising an apparatus with a view of obtaining all the beneficial results of the invention under such a disguise that they could induce the court in case of suit to allow them to escape the charge of infringement, or, in other words, they were determined if possible to appropriate the substance of the invention while leaving the inventor the empty husks of a worthless patent. In the case referred to this new apparatus was, in fact, and was finally admitted to be, substantially the apparatus of the inventor's patent with some devices added thereto. As soon as its new apparatus was ready and even before it was made so as to operate satisfactorily, the corporation began to advertise the same extensively in pamphlets, circulars and trade journals, and to supply the demands therefor.

SEEKING PROTECTION IN THE COURTS

SEEING the entire substance of his invention thus appropriated and finding his efforts to procure necessary financial aid and to market his invention completely blocked, the inventor commenced a suit in equity against the corporation in the federal court of the proper district to restrain infringement of his patent, after which pleadings

were served, proofs were taken by both parties and the case made ready for a hearing.

There was little use for the patentee to ask for an immediate injunction preliminary to the taking of the proofs or depositions of witnesses, because a motion for such injunction can only be made on affidavits supporting the charge of infringement. The federal judges in practically all cases frankly confess their inability, and will not undertake, to understand a patent, although it is a document issued by the government under its seal, except as it is explained to them by the affidavits or testimony of so-called "experts," and they will not grant such injunction at the commencement of the suit if any doubt is raised in their minds on any question in issue. The wealthy corporation rarely has any difficulty in raising such doubt, because, with its unlimited resources, for every affidavit which the independent inventor can procure supporting the charge of infringement, the defendant corporation can furnish ten or an hundred contradicting every allegation of the plaintiff's affidavits. For these reasons a rich corporation can, under our system of patent law and its administration, by the expenditure of a few hundred, or at most a few thousand, dollars for counsel fees and affidavits cunningly drawn by counsel and signed by hired "experts," create such doubts in the minds of the judges that it will be permitted to infringe any patent that is issued affecting its business for from three to five years while the patentee is prosecuting a suit for infringement against that corporation through the federal courts to final judgment.

EXPENSES OF PATENT SUITS

AT this point let us say a word about the proceedings and expenses of suits in equity to restrain infringement of a patent. In preparing the case for a hearing the patentee or complainant introduces the patent or a copy thereof and the depositions of one or more so-called experts, who must explain the invention described in the pat-

ent and the apparatus which is alleged to infringe the patent and show how it is related to that of the patent and give the reasons for holding it to be an infringement. The corporation or defendant then introduces such documents, including prior patents, as its counsel desires, and the depositions of other experts disputing the complainant's contentions, and attacking the validity of the patent, or denying infringement. Thereafter the complainant introduces documents and testimony to rebut the defendant's evidence, and the case is then ready for the hearing.

The taking and printing of the testimony in a patent suit are very expensive and wasteful and give the rich litigant enormous advantage over the poor litigant. The rules of the courts usually require the testimony to be taken before a stated examiner of the court, generally some friend of the judges, whose charge is about seventy-five cents per typewritten legal cap page, which is twice what it would cost if the counsel were permitted to have their own copyists typewrite the testimony before any notary public on whom they could agree. (We shall refer near the close of this article to the new Supreme Court rules, by which a district judge may order the parties to file affidavits, instead of depositions, of experts, and the witnesses must then be produced for cross-examination before the court upon the trial, or have their affidavits thrown out.) The printing of the testimony costs from fifty-five cents to a dollar or more per page. These expenses must be paid ultimately by the party against whom decision is rendered. Necessity compels the poor man to patronize the cheaper printer, while the rich corporation often patronizes the dearer, and the courts hold that in case the poor man finally wins, he can only collect fifty-five cents per page, because that is all he has paid, whereas if the other party wins, he can collect one dollar per page, because that is held to be a reasonable price.

The great bulk of this testimony consists of the depositions (affidavits) of so-called experts, which are made necessary because, although patents are formal documents prepared and issued under the seal of the government by a

corps of skilled and competent experts, all questions of their validity and infringement must be decided by federal judges who are unskilled and inexperienced in the subject-matter of patents and cannot understand them without the aid of experts. These experts are simply hired partisans of the party calling them, and before one is allowed to give testimony he is thoroughly instructed by counsel as to all points in issue and as to just what views he must hold and maintain in his affidavit upon each point. They receive compensation ranging from $10 to $100 per day, and are found in every commercial and manufacturing center where there is patent litigation. They include laboratory chiefs, engineers, lawyers, and college professors, the latter being particularly desirable if much talked about, as they are supposed to carry more weight with judges. Frequently they advertise their vocation in newspapers: "Expert testimony furnished." In practically every case the opposing experts directly contradict each other, and the judges then say that, since "the experts are in flat contradiction," they must decide the case relying on their own common sense and such knowledge as they possess. In addition to the foregoing, the inventor must pay the daily charges of his experts and those of his attorney for his attendance while taking the testimony both of his own experts and of the opposing experts; and then there are the usual costs of the courts, including those for certifying the cumbrous records on appeal. An inventor cannot usually carry a suit through the federal courts in an endeavor to maintain his patent and restrain one whom he believes to be an infringer unless he is prepared to spend from $5,000 to $25,000, which is prohibitive. A recent act of Congress intended nominally to lessen the expense of printing and certifying appeals in the federal courts is limited by its terms to appeals from *final* judgments, but as most appeals in patent cases are from *interlocutory* or intermediate, and not from final, judgments, such cases are eliminated from such pretended advantages. Probably one half or more of these expenses could be avoided and the judges be in better position to decide patent cases intelligently if experts

were wholly excluded and the opposing counsel were compelled to give, under oath if need be, a brief statement of the facts and reasons based thereon in support of their respective contentions in the case, and nothing would be lost, since every "expert" is expected to follow faithfully in his testimony the instructions given him by counsel. But it would, of course, be far better still if all questions relating to patents could be decided only by judges who are themselves experts, thereby avoiding the necessity and attendant expense of expert testimony, as we shall presently point out.

CREATING A DEFENSE

IN the instance above referred to, the inventor having submitted the usual proofs to establish a *prima facie* case of infringement, it was necessary for the defendant corporation to make a defense, and as none could be found, either in the records of the Patent Office, in its own publications, or in the literature of that art, its only reliance must be an attempt to show that there was in use an apparatus capable of effecting the results set forth in the patent, before the inventor made his invention, or more than two years before he filed an application for his patent, since the law allows an inventor two years to adapt and perfect his invention after its first conception, before filing his application, if, meanwhile, he uses reasonable diligence, and this is the way the defense was prepared:

1. The managers and attorneys of the corporation had a drawing made which was a duplicate of that shown in its old catalogs, but they added to the new drawing an attachment or improvement not shown in the catalogs or circulars, and one of its employees swore that the drawing represented an apparatus made by the defendant and sold by it to a customer five or six years before the drawing was made and nearly two years before the inventor filed an application for his patent. They admitted that the apparatus as shown and advertised in their catalogs

would not anticipate or limit the inventor's patent, but they alleged that with the attachment added thereto, while not the apparatus of the patent, it would accomplish enough of the results set forth therein to so far limit the patent as to make it practically worthless.

2. This employee of the defendant then took a copy of the new drawing to several of the employees of the alleged purchaser of the apparatus, explained it to them, told them that it showed an apparatus which was sold by the defendant to their employer and used by them at the times he had sworn to, and also told them that they would be called as witnesses for the defendant.

3. The defendant's attorneys next interviewed these employees, again explained and discussed with them the new drawing with its additions, made arrangements with them to become witnesses for the defendant, furnished them a list of the questions that they would be asked and agreed with them as to the compensation they were to receive for testifying, after which they were called as witnesses, had the list of questions read to them and answered to the effect that the new drawing, prepared as above, represented an apparatus which was used in their employer's business at the times in question, but the attorneys would not allow them to tell how much they were to receive for giving their testimony. They were asked whether their employer had in its shops drawings of the apparatus in use at the times referred to and whether they showed the apparatus with the attachment or improvement recently added to the new drawing, and they answered that such drawings were in their employer's shops and that they showed the old apparatus of the defendant's catalogs without said attachment or improvement. These old drawings were kept out of sight.

4. The attorneys then introduced records from the defendant's books of orders for apparatus from, and sales of apparatus to, the customer, at the times referred to, but all such orders and sales related to the apparatus as it was shown in the defendant's contemporaneous catalogs and circulars, without the slightest reference to the attachments

or improvements lately added to the new drawing. Though both defendant's employee and the employees of the customer swore that the attachments were sold by the defendant to the customer, records of which sales (if true) were in defendant's books, its attorneys carefully withheld the records of these alleged sales and of the times when they took place from the court.

5. The defendant's employee was asked whether he or the defendant ever made any attempt to secure a patent for the apparatus shown on the new drawing and he answered that, while the matter had been carefully considered, they had not tried to secure a patent, as they believed that the apparatus was not patentable, and yet, if the pretensions of the defendant's managers and attorneys were true, they could have secured a patent that would have given them a monopoly of this new and revolutionizing advance in the art for 17 years, and would have been worth several million dollars to the defendant corporation, whereas they preferred (so they pretended) to throw that opportunity away and allow that revolutionizing apparatus to become public property.

To rebut this oral testimony of these witnesses, the inventor's counsel proceeded as follows:

1. He put in evidence and relied upon the catalogs, circulars, advertisements, drawings, etc., issued by the defendant at the times in question and for two years thereafter, as well as the catalogs, advertisements, etc., of other manufacturers in the same line, and showed that not one of them contained the slightest mention of or reference to any such apparatus or any such results or operations as those set forth in his patent, while they actually gave warning of the dangers that would follow attempts to so operate their old apparatus; that the defendant and other manufacturers made haste to set aside their old apparatus and to devise and furnish a new apparatus for the purpose of effecting the results or operations set forth in the patent as soon as they heard of it; and that the first mention that was made by them in drawing or in print or in writing of any kind of apparatus for which they claimed any of

such results or advantages was after they knew all about the inventor's apparatus, and after he had filed an application for a patent thereon in the Patent Office.

2. The inventor swore, aided by drawings and dated memoranda and confirmed by several witnesses who made or identified the drawings and memoranda, that he made his invention prior to the time when the witnesses declared that the apparatus shown in their newly-made drawing, referred to above, was sold by the defendant and used by its customer, and more than two years prior to filing an application for his patent; also, that during the whole of such time he devoted himself exclusively to the work of adapting and perfecting his invention, and to securing financial backing and factory equipment to place the invention on the market, and actually perfected the invention, secured such facilities and began the manufacture and sale of the invention. No later evidence was introduced by the corporation, so that the above was uncontradicted.

3. The inventor pointed out that not one of the old patents referred to by the defendant's hired expert contained the slightest reference to those results and operations which the invention set forth in his patent was designed to provide, but that each and all of them was intended for some other and different purpose, as particularly pointed out therein, and in so doing he agreed exactly with the experts of the Patent Office and differed as radically with the defendant's hired expert.

4. The patentee was not trying to restrain the defendant corporation from making its old apparatus, as illustrated either in its catalogs and circulars when his invention was first made known, or in the newly-made drawing, referred to above, showing the attachment or improvement added thereto. He was only seeking to restrain it from making the new apparatus which its engineers had devised after they knew all about his invention and had obtained and become familiar with copies of his patent and had in its factory one of his mechanisms made in accordance with his patent. In order to show the real character of this lately devised apparatus, and that it was in substance

merely that of his patent with certain devices added thereto, he introduced in evidence the defendant's pamphlets, circulars and advertisements illustrating and describing this new apparatus and setting forth its advantages over its old apparatus, and he declared that all these documents told the truth about said apparatus, and that he stood by the statements made therein; but the defendant's attorneys called several hired experts, who contradicted said publications and sought to show that said new apparatus was very different from what the defendant's own published descriptions declared it to be.

The case was then submitted to the court. The trial judge had no difficulty in deciding every point in favor of the patentee, holding that the patent was valid and had been infringed, and that an injunction should issue. The business of the big corporations is conducted by very shrewd men and they are aware that it is a waste of time to cultivate the friendship and the favors of any judges except those whose decisions are to be final.

The defendant corporation appealed to the Circuit Court of Appeals, with these remarkable results:

1. Two of the three judges of that court, for whom the inventor's attorneys had introduced two additional copies (so that each judge would have a copy) of the pamphlets, circulars, advertisements, etc., constituting the documentary evidence on which the inventor based his case, since they sustained his entire contentions and refuted those of the defendant's hired experts, left those documents tied up in the bundle in which they were placed when first introduced, and did not examine their contents, but evidently allowed the other judge to decide the case and merely gave their assent.

2. The judge who wrote the opinion and decided the case proceeded after this fashion:

He held that the apparatus as shown on the newly-made drawing, that is, the apparatus shown in the defendant's old catalogs with attachments or improvements added thereto, for the purpose of creating a defense as hereinabove set forth, was sold by the defendant and used by the pur-

chaser, not only at the times stated by the witnesses, but a long while prior to that time.

He declared that there was nothing in the record to contradict or cast doubt upon the oral testimony of the witnesses as to when said apparatus, including said attachments, was sold and used, whereas such testimony was both inconsistent with and contradicted by all the catalogs, pamphlets and advertisements issued by the defendant at the time of and for several years after said alleged sales and use, and by thus carefully excluding from his opinion all reference to such publications and by the above statements at utter variance with the facts, he conveyed, and doubtless intended to convey, the impression that no such documents existed.

He declared that the oral testimony of the witnesses as to the sale by the defendant and use of said apparatus, including the attachments that were added to said drawing, was confirmed by written memoranda and data, such as orders for and bills of apparatus sold by the defendant, whereas all such written data related solely to the old apparatus as shown in the defendant's catalogs and circulars and contained no reference to any of said attachments or improvements, all reference to the dates when the latter were sold being carefully withheld from the court and excluded from the judge's opinion.

He sustained in its entirety all the oral testimony of the defendant's witnesses, though it was contradicted by the defendant's own contemporaneous publications, but he rejected in its entirety the testimony of the inventor and his witnesses as to when he made the invention and what he did in perfecting it and preparing for its manufacture and sale, though that testimony was confirmed by memoranda and data and was not contradicted by a word or circumstance in the case.

In order to have seeming justification for his determination to destroy the inventor's patent, he declared that the patent was substantially the same as one or more old patents, although none of them contained a reference to the results or operations for which the inventor devised his

apparatus, but each of them did relate to and describe a wholly different purpose and result, and none of them had ever gone into use or added anything of value to the art. He thereby merely read into some old patents something to which none of them made reference, and ignored the inventor, the patentees of these old patents and the experts of the Patent Office, who recognized the inapplicability of the old patents as references.

In considering the defendant's new apparatus which was claimed to infringe the inventor's patent, he sustained the experts hired by the defendant to contradict its own publications, and he carefully excluded from his opinion all reference to those publications or to the fact that the patentee adopted and stood by every statement contained therein as true, thereby conveying and intending to convey the impression that the patentee's contentions were not confirmed.

He omitted all mention of the fact, most damaging to the defendant's pretensions, that no attempt had ever been made to secure a patent on the old apparatus with the attachments added, alleged to have been sold by it, whereas, if all its pretensions were true, a patent might have been secured in the defendant's behalf that would have been worth to it several million dollars.

In order to understand the gross injustice of such rulings as the above, a word concerning the law governing the situation is necessary. The frequent attempts to destroy patents in order to appropriate the inventions described therein, by trying to show by oral testimony that the same or a very similar apparatus was in use prior to the making of the invention by the patentee, led the United States Supreme Court to lay down the following rules of law for the express purpose of protecting patentees.

"In view of the unsatisfactory character of such [oral] testimony, arising from the forgetfulness of witnesses, their liability to mistakes, their proneness to recollect things as the party calling them would have them recollect them, aside from the temptation [receiving compensation] to actual perjury, courts have not only imposed upon defendants the burden of proving such devices, but have required that the proof shall be clear, satisfactory and beyond a reasonable doubt.

"Indeed, the frequency with which testimony is tortured, or fabricated outright, to build up the defense of a prior use of the thing patented, goes far

to justify the popular impression that the inventor may be treated as the lawful prey of the infringer." (143 U. S. 275, 285.)

"Granting the witnesses to be of the highest character, and never so conscientious in their desire to tell only the truth, the possibilities of their being mistaken . . . are such as to render oral testimony peculiarly untrustworthy; particularly so if the testimony be taken after the lapse of years from the time the alleged anticipatory device was used, and if there be added to this a personal bias, or an incentive [promise of compensation] to color the testimony in the interest of the party calling the witness, to say nothing of downright perjury," etc. (155 U. S. 286, 301.)

One of the circuit judges has stated the same rule of law, as follows:

"The rule applicable to this defense [alleged prior use] is as axiomatic as a similar rule of the criminal law, . . . that it is a defense which must be established beyond a reasonable doubt." (105 Fed. Rep. 242.)

Mr. Justice Blatchford, one of the greatest of our patent judges, had occasion while a district judge to apply the above rule in a case wherein a wealthy defendant, when sued as an infringer, tried to prove by the oral testimony of witnesses and data prior knowledge and use of the patented device, but the patentee introduced the defendant's catalogs, circulars, etc., showing a complete absence of any mention of the patented device at the times in question, while they described and offered for sale other and inferior devices. Judge Blatchford held that the documentary evidence of these publications was absolutely controlling, and overcame the oral testimony of witnesses. That decision, laying down the principle that it is incompetent for a defendant attempting to destroy a patent to satisfy the rule of law, "as axiomatic as a similar rule of the criminal law," that the evidence must carry conviction *"beyond a reasonable doubt,"* by the oral testimony of witnesses that the apparatus was made or sold by the defendant, which is inconsistent with and contradicted by the contemporaneous catalogs, circulars, etc., of the defendant, has remained to this day without being questioned even by a trial court.

When it is said in any given case that the law is in favor of the plaintiff, or that it is in favor of the defendant, it is meant merely that there is an inference or conclusion of right in favor of that party based upon certain facts

which are admitted or found to be true. In every suit there are always a very few material facts (often but one) which when found to exist demand that judgment be given for the party in whose favor such facts are found. Where the judge decides the facts as well as the law, as in every equity suit on a patent, he can favor either party with his decision by merely suppressing or perverting some one (or very few) material fact in the opposite party's favor, or by arbitrarily finding that a material fact exists in a party's favor, as for instance by allowing a corporation to contradict the evidence contained in its own contemporaneous publications by oral testimony of witnesses (hired), and then suppressing all reference to such documents, and even declaring that there is nothing in the record to impeach the oral testimony. Still another way in which the same result can be effected is for the judge to declare in his opinion that the patent sued upon is substantially the same as some old patent that was before the public for years, that never went into use, that never added anything of value to the art, and which the Patent Office experts recognized as having no essential relation to the patent in suit, simply because the party to whom he wishes to give his decision has hired one or more witnesses to swear that the old patent was substantially the same as the new. And in either of these cases he prevents any error of law from appearing on the face of his opinion and so avoids detection. Moreover, to avoid the unnecessary expense of printing the catalogs, pamphlets, etc., of a party, they are usually introduced as exhibits or exhibit models and are read or referred to or quoted from in the arguments and briefs. As soon as the case is finally decided the court orders these exhibits to be destroyed unless counsel remove them within thirty days. When a corporation is permitted to hire witnesses to contradict by oral testimony the indisputable evidence contained in its own contemporaneous publications, and the judge gives that concern his decision by concealing from his opinion all reference to those documents (instance, *supra*), nobody can by examining the records on file in the court discover the judge's conduct, because those documents have

been either destroyed or removed, and this practice greatly aids in making detection impossible.

THE COURTS AND THE INTERESTS

UNDER such circumstances as related above there is nothing left for the inventor to do but to turn over his patent and all the results of his many years' efforts to the big corporation on its own terms. (We shall speak below of the writ of *certiorari.*) But we do not intend to imply that an inventor striving to uphold his patent will meet with such treatment as we have detailed above in all the circuit courts of appeals, for no doubt many of the judges of those courts will make every conscientious effort to decide cases fairly, so far as their qualifications, limited within a narrow compass of study and experience, will permit. With so many courts before which the owner of a patent may take his case, he cannot be sure of the treatment he will receive in any one; but the big corporation knows, and its managers, having choice of several circuits in which to prosecute a suit on a patent, will choose circuit A instead of circuit B, and, if asked why, will answer: "We like the judges of the court of appeals of circuit A better than we do those of circuit B."

Regarding wrongs which are more particularly traceable to the courts, and those which independent inventors especially suffer, we may quote the following:

"The interests have retreated into the courts. Beaten in legislatures and executive offices they are going to make their last stand behind the judiciary." —The late Tom. L. Johnson.

"With all my respect for the courts, I do not feel that they are so holy that they are incorruptible. There are judges who have served corporate interests so long that they can't see straight."—Senator La Follette in a recent speech.

"The next most important corruption to be eliminated is the control of the executive and judiciary. They [business interests] are especially keen at present to own the judges. We have been taught to hold the judiciary in great reverence. But the federal judiciary, particularly in the lower branches, has not always been entirely free from the domination of the avaricious."—Senator Bristow, *Columbian Magazine,* September, 1911.

"The fact is, Mr. President, that the railroads and special interests of this country make themselves extremely busy about appointing judges on the bench, * * *

"Moreover, judges on the bench, being merely human beings after all,

are themselves controlled by their environment, by their professional education, by social, political and business influences."—Senator R. L. Owen.

"But at the present time the Church is, on the whole, allied with the great interests. It is their ally and not the defender and protector of the poor.

"And here we come to the corruption of politics, the commercialization of politics for the promotion of business. We have been shocked and startled, until we have become almost callous to such things, by the revelations of political immorality, of the venality of the voters on the one side, and on the other side of the ingenuity and boldness of business interests in purchasing votes and controlling legislatures, administrative officers and courts."—Rev. John P. Peters in a recent address.

"As to wealthy corporations, it has become obvious that the skillful handling of patent cases places them at an untold advantage against their smaller competitors. For them, a well-organized patent department is a reliable machine, where money is the lubricant. This machine, in its slow but sure grinding way, can reduce to pulp any of the smaller competitors. For large corporations, the maintenance of such a machine with a staff of lawyers and experts, is merely a small side expense. By its aid they can bluff their weaker competitors into quick submission. If this is not successful, they can drag out a patent suit indefinitely, until the weak opponent, unable to bear the ever-increasing expenses, collapses and withdraws.

"These tactics are well known, and have been played successfully, whether it was to uphold a worthless patent or to obtain immunity in case of infringement. In every case the wealthy corporation is sure of the outcome of the game, and plays 'Heads I win, tails you lose.' "—President American Institution of Chemical Engineers.

"Under existing methods of trying patent causes an inventor-patentee of average means could not, at his own expense, carry to a conclusion an average patent litigation against a wealthy opponent, and therefore a few wealthy concerns usually acquire nearly all important patents in their field, to the great damage of the Nation, because of the restraint of competition and because of the resulting tendency of such inventors to seek protection for their inventions by trade secrets or else to cease inventive work."—*Inventors' Guild.*

NINE CIRCUIT COURTS OF APPEALS

PRIOR to 1891 all suits for the infringement of patents could be appealed to the United States Supreme Court for final decision, but in that year an act of Congress was passed creating in each of the *nine* circuits into which the country is divided a "Circuit Court of Appeals," to consist of three judges and to hear and finally decide (among other cases) all appeals in patent suits arising within the states constituting that circuit. These nine circuit courts of appeals are just as independent of one another as are the courts of last resort in the several states of the Union. At the time these courts of appeals were established it is doubtful if any other motive was present than a sincere desire to relieve the Supreme Court of an ever accumulating burden of cases, but the large manufacturing corpora-

tions and trusts were not long in discovering how perfectly they were adapted to enable them to appropriate the work of independent inventors on their own terms, and they have taken full advantage of their opportunities.

The creating of *nine* courts of appeals, each to be a court practically of last resort in those patent cases which arise within that particular circuit, could have no other result than the great confusion and lack of uniformity in their decisions now so apparent. The result has been similar in kind to that which would follow if all the states of the Union could be divided into three groups and three of the Justices of the Supreme Court assigned to decide all cases on appeal arising within each group of states, so that instead of one Supreme Court we should then have three divisions of that court, each independent of the others.

A still more serious objection is that it has been generally recognized, as a fundamental principle of our judicial system, that a court of appeals of practically last resort for the determination of issues of great importance having but three judges is neither competent nor safe. One or two or all three judges may be novices and utterly inexperienced in the kind of issues to be decided, and this is usually so in patent cases; and if two of the judges have had experience, their relations of friendship and mutual respect may be such that the writing of the opinion may be assigned to one while the other (with the inexperienced judge) merely assents, without taking the trouble individually to give the case serious consideration; or one of the judges may possess such dominating personality that he may be able to silence all opposing views; so that the decision is in effect a decision by one judge (instance, *ante*). With but three judges, also, the danger of improper influence is too great. It is needless to attempt to enumerate all the means and channels through which this influence upon judges is wielded or attempted (excluding here all reference to direct bribery), for they are never known. Cultivating personal acquaintance and friendship, praise for their wisdom upon the bench, readiness to recommend and work for their promotion to higher or more lucrative

positions, reminders or knowledge of similar favors rendered in the past, quietly suggesting opportunities for profitable investments, these are only some of the commonest forms. The following from a recent lecture of Sir Frederick Pollock at Columbia University is pertinent:

> "Powerful interests may be arrayed against the law. . . . Their aim is, if possible, to capture its machinery and use it for their own purposes. Chicane and corruption are their weapons. . . . Intimidation is employed more sparingly, not from moral scruple, but because it is less profitable and provokes defensive combination; and when it is employed *it is in the form of social and financial pressure.*"

We insist that our United States Supreme Court shall have nine Justices, and they are anxious to have every cause argued before a full bench. All the United States special courts, such as the Court of Claims, the Court of Customs Appeals and the Commerce Court, have five judges each. The Court of Appeals of the State of New York has seven judges, who strive to have all the members sit at the argument of every cause; and each of the Appellate Divisions of the State Supreme Court has five judges (seven in New York City, with five sitting together). The *nine* United States Circuit Courts of Appeals, each having but *three* judges, are an anomaly as federal courts of practically last resort for the decision of cases involving issues of the largest importance.

The incongruities and contradictions, not to say bias and favoritism, which appear among the decisions in these nine courts of appeals in patent cases are too well known to require comment, for they amount to little short of a scandal upon the administration of justice. A very few illustrations will suffice.

In one case suit was brought for infringement of a patent for a mechanical apparatus which included a motor as part of the combination to operate the apparatus. Two motors, A and B, were known at the time and both were suitable for the purpose. The inventor selected motor A and adapted it for use in his combination, and the Court of Appeals declared that his patent was valid and entitled to a reasonable range of equivalents, or to a reasonably broad construction. Other manufacturers, to avoid paying

the inventor royalties, discarded motor A from the combination and substituted motor B and the court held that they did not infringe the patent.

In another case the patent sued on related to two hollow pieces of metal and a union nut for coupling them together. For many decades this construction had been employed in which the two pieces had been made both of brass and of iron, in one form, A, and coupled together with a washer or gasket between them, and in another form, B, and coupled together without a gasket between them; and they had also been made and used, one of brass and the other of iron, in both of these forms. Still, both the circuit court and the court of appeals held the patent valid and infringed; but the patent was owned by one of the large manufacturing trusts and its counsel having the matter in charge brought the suit in that circuit where its principal works were located and where its officers and attorneys were in almost daily contact and friendly association with the judges.

[The last paragraph was written before any charges were openly made against any of the judges responsible for the decision referred to, but since it was written one of the judges principally responsible for that decision has been placed under impeachment before the Senate on charges of official misconduct in other matters not having to do with patent suits. We may now add, that since the preceding sentence was written, the Senate has found that judge guilty and removed him from the bench. But the two senators from his state, representing the same "interests" which secured his appointment to the bench, were among the five who voted "not guilty."]

In another case the patent sued upon was owned by a corporation, and in the court of appeals the writing of the opinion was first assigned to a judge who was a complete novice, and he tore the patent into pieces, declaring it had not been infringed, the other two judges apparently giving the matter no attention. The owner of the patent, whose stockholders included many business men of prominence, moved for a rehearing and reargument, alleging errors on

the part of the novice judge, and one of the more experienced judges thereupon wrote a new opinion, tearing the opinion of the novice judge into pieces, and holding the patent valid and infringed. Both opinions appear together in the law report.

In another case President Taft, while a circuit judge, delivered the opinion of the Circuit Court of Appeals of the 6th circuit (55 Fed. Rep. 69, 77), in which, with the best intentions, no doubt, but inexperienced in patent law, he laid down the erroneous proposition of patent law that an inventor, in order to maintain his rights against a later inventor of the same apparatus, must "show that *from the time of his original conception* * * * he was using reasonable diligence in adapting and perfecting his idea to practical use." For several years that decision was freely quoted by lawyers whose purpose it served and it had an unsettling effect upon that branch of the law, and had it been generally adopted would have deprived hundreds of meritorious and first inventors of their rights to their patents; because the correct rule of law is that the first inventor must show reasonable diligence, not from *"the time of his original conception"* of his invention, but from a time just previous to the conception of the invention by the second inventor. Fortunately, the experts of the Patent Office quickly saw the error in that decision and declined to follow it, as did the Court of Appeals of the District of Columbia, and we believe it has not been followed by any of the other circuit courts of appeals.

Perhaps the following shows as ludicrous a situation as any revealed by the present motley system.

Suit was brought on a patent in one circuit and the three judges of the court of appeals of that circuit united in declaring the patent void. Suit was then brought on the same patent in another circuit, and the three judges of that court of appeals united in declaring the patent valid. The matter was then taken before the United States Supreme Court to determine which of these two courts of appeals was right, and before the case could be reached two of the judges (including the writer of the opinion) of the court

of appeals who declared the patent void had become members of the Supreme Court. They took no part in the decision in that court, but the other seven Justices unanimously held that the patent was valid.

It is scarcely to be conceived that any such decisions could have been rendered by a competent court of patents appeals composed of seven judges, all having an intimate knowledge of patents and of the various arts to which they relate, and thoroughly trained for their special work through years of experience in the Patent Office before becoming judges, as we shall point out *infra*.

PATENTS IN THE SUPREME COURT

THE statute creating the nine circuit courts of appeals gives the party against whom a decision is rendered in one of them the right to petition the United States Supreme Court (technically called a petition for a writ of *certiorari*), for permission to appeal to that court, because Congress evidently foresaw that numerous errors must be made by these courts of appeals, each composed of but three judges (sometimes of but two where the third is indisposed or not available). During the first few years after these circuit courts of appeals were established and while Mr. Justice Brown (undoubtedly one of our greatest patent judges) was still a member of the Supreme Court, a more liberal rule was followed in allowing appeals (writs of *certiorari*) to that court. In two such cases of importance, wherein appeals were allowed, Mr. Justice Brown delivered the opinions of the court, holding in each case that the patent sued on was valid and had been infringed, and in so doing affirmed the decision of one circuit court of appeals in one case and reversed the decision of another of said courts in the other case. So far as these two cases afford the criterion for our conclusion, they indicate fifty per cent. of error in the circuit courts of appeals, and there is no reason whatever for saying that, had all other patent decisions rendered by those courts been appealed to and

decided by the Supreme Court, one-half of those, even in which all the judges sitting in the several courts of appeals concurred, would not have been reversed.

Again, in one of these circuit courts of appeals (called for convenience court of appeals A), which has had many patent cases to decide, four decisions were rendered in as many cases construing four patents which also became the subjects of suits decided in one or another of the other circuit courts of appeals and in which said patents received a different construction from that given to them by court of appeals A. The cases were then appealed to and decided by the Supreme Court, who sustained court of appeals A in one case and reversed it in three cases. This shows 75 per cent. of error in those cases by court of appeals A, and there can be no kind of proof that if all the decisions of that court of appeals in patent cases could have been appealed to the Supreme Court, three-fourths of them would not have been reversed.

Speaking from the above six cases as a basis, which are fairly representative and in which the circuit courts of appeals were right twice and wrong four times, the writer hereof has no hesitation in saying, that, considering only those patent suits which the Supreme Court would ultimately decide in favor of inventor-clients, could they be appealed to that court, he would prefer, rather than subject such clients to the long delays, expenses and dangers of adverse decisions through ignorance or influence in the circuit courts of appeals, to go at the outset with opposing counsel before a judge and have each case decided by the toss of a coin, and particularly where large business interests are arrayed upon the other side. Outrageous as it may seem, it is nevertheless true that the great army of struggling, independent inventors would be better off and their rights under their patents be more secure if they had the authority to summon the large corporations before a court (still confining our remarks to those cases which the Supreme Court, could it be appealed to, would finally decide in their favor), and have the questions of the validity and infringement of their patents decided by tossing a coin; because they would

then at least stand an equal chance of winning where they are entitled to win, whereas at present they are in nearly all cases, so long as they retain ownership of their patents, precluded by delays and expenses and cunning from even getting into court and having a hearing.

More recently the Supreme Court, with an ever increasing number of cases on their overcrowded calendar, have construed the act referred to more strictly, and in their later decisions have declared: "The statute makes the decision of the Circuit Court of Appeals final in patent cases." As said act is now construed, there is little need of striving to secure an appeal to the Supreme Court except in cases where the same patent has been differently construed by two circuit courts of appeals, or some extraordinary situation arises. There is no chance of securing an appeal where the party has no other reason to assign than that the decision of the court of appeals was erroneous, no matter what caused that erroneous decision, for the Supreme Court will regard all statements in the opinion of the court of appeals as final, no matter how false they may be in reality. The fact, therefore, that a petition for an appeal (*certiorari*) to the Supreme Court has been filed and denied in any given case carries no presumption that that court approves the decision; it means merely that they have declined to allow the case to be discussed before them, because, as they have said, "the statute makes the decision of the Circuit Court of Appeals final in patent cases."

We may here add, however, that even in petitioning the Supreme Court for this last opportunity to maintain what he believes to be his rights (and what that court would so decide could it be appealed to), the bars are up against the poor man. This petition, with all exhibits and arguments, must be submitted in writing, and they are prepared and forwarded to the clerk of the court, who examines them, and if in proper form files them and places the case on the motion calendar. But instead of allowing the clerk to hand the papers to the court, the dignity of the situation demands that this momentous labor can be performed only by some counsel in person, who, accordingly, takes the papers

from the clerk, announces to the court that he desires to file them in the given case, without being permitted to speak another word, and, frequently knowing nothing of what the papers contain, hands them back to the clerk and levies his fee. To avoid the expense of sending counsel to the capital, some Washington attorney must be engaged to present these papers to the court, and the usual fee is fifty dollars, which a poor litigant may be able to pay only by borrowing. A word from the Chief Justice would be sufficient to enable the clerk to hand this petition to the court and stop this current of needless tribute flowing into the pockets of some Washington lawyers.

GREAT PATENT JUDGES OF THE SUPREME COURT

THE difference between the Supreme Court and one of the nine circuit courts of appeals is far greater than that between nine judges and three judges, for it is the difference between nationality and locality. The nine groups or circuits into which the States of the Union have been divided, according to locality, include a New England circuit, three middle Atlantic circuits, a southern circuit, three Mississippi Valley circuits and a Pacific circuit. The people of each circuit have their own peculiar traits of character and thought, which differ at certain points quite radically from the corresponding traits of the people of other circuits. The Supreme Court is composed of nine justices, one of whom is assigned to each of these nine circuits. In theory, at least, one justice should be, and usually has been, chosen from those who represent the highest professional and moral standards in each circuit, so that when they are brought together into the Supreme Court they may represent the highest professional and moral standards of every section of the country and constitute both in name and in fact a court truly representative of the *national* character. A tendency has of late years been observed to depart from the above rules, until recently one circuit (sixth) had three representatives in the court, another (fifth) had two, while

three circuits (third, fourth and seventh) had none, and at the present time two circuits (fifth and sixth) have two representatives each, while two (fourth and seventh) have none; but it is believed that in so far as such a practice prevails in just so far is the Supreme Court weakened both in power to correctly interpret the public will and in ability to command the fullest public confidence of all sections of the country. It is certain that such practice tends to deprive the court of its truly *national* quality and to make it assume more of the local quality. The court of appeals of every circuit is purely local and in no sense national.

But mere numbers alone could not have given the Supreme Court the great efficiency they have shown as a patents court. Two qualifications are necessary for a successful judge in patent cases, in addition to all the implied qualifications of education, honesty and impartiality, and these must exist in extraordinary degree if the judge would be more than an intelligent guesser. One of these qualifications is an instinctive or intuitive (not merely acquired) knowledge of mechanics (since most patents relate directly or indirectly to mechanics), or an instinctive or intuitive ability to perceive the mathematical relations of things (mathematics forms the ultimate basis of all the subject-matter of patents); and the other is an inherent belief in, and sincere devotion to, the principles of the patent law and the public policy embodied therein, with such resolution to uphold and advance both of these as can only come from strong sympathy with the work which inventors do and appreciation of the benefits which they confer upon society. The justices of the Supreme Court, drawn as they usually have been (and always should be) from every section of the country, and representing, both in theory and in actual fact (within every fair and reasonable expectation), the best of the nation's intellectual and moral qualities, have included among their numbers at practically all times (as was to be reasonably expected) at least one justice who possessed the foregoing qualifications in amplest degree; and the Supreme Court owe practically all the credit they have earned for their great efficiency in the decision of

patent cases almost entirely to those justices who have been few in number (they can be named almost on the fingers of one hand), but of commanding intellect and endowed in extraordinary degree with the qualifications which we have recited above. It scarcely need be added that such things as wielding undue influence with this great national court, or inducing them to uphold and follow the oral testimony in a party's favor, and to ignore such contradictory and conclusive evidence as that contained in that party's own publications, first, by declining to refer to such publications, and, second, by declaring that no such evidence is in the record (as in instance described, *ante*), are utterly unthinkable.

EXPOSURE OF THE SYSTEM

WHY have not the wrongs and injustice to inventors of the present system been exposed heretofore? Laymen, while able to appreciate these wrongs and injustices, have not had the experience either to understand the reasons or to suggest adequate remedies therefor. Such suggestions can only come from lawyers who have had intimate contact with the system. "Lawyers are steeped in tradition, intolerant toward reform, stolid to change." The distinguished members of the bar are usually employed by the big corporations (which makes them distinguished), who serve their clients' interests and have no intention of criticizing a system which enables them to completely emasculate the patent law for the double purpose, first, of preventing independent inventors from gaining headway against the interests which they represent, and, second, of enabling their clients to appropriate the work of those inventors on their own terms or at the cost of possible litigation. There are several reasons why no lawyers have either cared, or dared, to expose the wrongs of the system or to speak in criticism of the federal courts, among which may be mentioned, 1, danger of contempt of court and disbarment; 2, fear of loss of standing in the profession through denunciation by the distinguished counsel of the large inter-

ests and their clients; 3, the belief so common that it is better to submit to wrong to others than by opposing wrong to bring possible trouble to self; 4, only a professional and not a personal interest in the issues; and, 5, the hope eternal that at some time in the future they, too, may be employed by the big corporations and become distinguished. We shall speak here more particularly of the first of these.

The federal courts, so far as concerns the rights of persons to practice therein, are like private possessions of the judges, who have the exclusive right to say who shall be permitted to practice in these courts, and when and for what reasons they shall be disbarred, or proceeded against for contempt. There are two exceptions: 1. Congress has passed an act giving to every litigant the right to appear and conduct his own case in any federal court, and, 2, it has by another act given to women possessing certain qualifications and experience the right to practice before the Supreme Court; but it has not given women the right to practice before any other court, nor has it given men the right to practice before any federal court except as the judges may permit; and the judges can disbar any attorney when they feel that their dignity has been offended, or that their competency or their integrity has been challenged.

Congress by the judiciary act of 1789 authorized federal courts to inflict punishments for contempts, leaving it to the judges' discretion to determine what acts they would consider contempts. Owing to the arbitrariness of some of the judges in inflicting punishments for alleged contempts (resulting in the impeachment of Judge Peck in 1831), Congress in that year passed another act carefully defining what shall constitute contempts of court and limiting the judges' right to punish for contempts by fine or imprisonment to the three cases specified in the act. This act affords a certain protection to citizens and counsel alike from punishment for contempt of court, but there is no statute giving the slightest protection to an attorney from disbarment because of any criticism which he may have passed upon a court or judge. In all the proceedings of our courts that are reported in law books it is doubtful if

anything can be found showing a more reckless disregard of human rights, a clearer desire for personal revenge, if not, indeed, bitter spleen and vindictive malice, than have been shown by some federal judges in their attempts to disbar lawyers who had offended their dignity or impugned their judicial conduct. A number of these cases were taken on petition to the Supreme Court, who in several instances issued their mandamus directing the judges below to vacate the orders of disbarment and restore the attorneys to their former status, for the sole reason that the judges lacked jurisdiction, but denied the attorneys relief in every other case.

In one case a federal judge of the territorial court of Minnesota disbarred an attorney just prior to adjourning court for several months, without notice to him of any charges against him, or that disbarment was threatened, or that an order of disbarment had been entered, and he only learned of his disbarment several months thereafter. He applied to the Supreme Court for relief, but that court by its then Chief Justice, Taney, denied his request, declaring that in the United States courts "the relations between the court and the attorneys and counsellors who practice in it and their respective rights and duties are regulated by the common law"; and "by the rules and practice of the common-law courts that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed." (Ex p. Secombe, 19 How. 9.)

In another case an attorney, because of his conduct toward the judge during a criminal trial, was disbarred after notice and hearing. The Supreme Court granted his request for relief on the ground that the judge below was without jurisdiction in that particular case, but they reaffirmed their previous declarations that it rests entirely within the discretion of a judge to say whether an attorney should be disbarred or not and that the Supreme Court has no power to control that discretion. After stating that an attorney cannot appeal from an order of a judge disbarring him and have the merits of his disbarment de-

cided, and that a petition for a mandamus is his only remedy, the Supreme Court referred to "the abuses of the inferior courts against their officers" (attorneys), and to the "flagrant wrong" sometimes committed against them, and declared:

> "The attorney or counsellor, disbarred from caprice, prejudice or passion, and thus suddenly deprived of the only means of an honorable support of himself and family upon the contrary doctrine contended for, would be utterly remediless. It is true that this remedy [mandamus], even when liberally expounded, affords a far less effectual security to the occupation of attorney than is extended to that of every other class in the community. For we agree that this writ does not lie to control the judicial discretion of the judge or court."—(Ex p. Bradley, 7 Wall., 364, 376-7.)

In another case an attorney, having been illegally disbarred, applied to the Supreme Court for relief and his request was granted. But the court reaffirmed their previous statements, that whether an attorney shall be disbarred or not depends wholly upon the discretion of the judge. It was in this case (Ex p. Robinson, 19 Wall., 505) that the Supreme Court stated that every federal court has the *inherent* or *incidental* right, derived from the fact, and at the instant, of its organization as a court, to punish for contempts (and to disbar attorneys), within the judge's discretion, and that such right does not depend upon constitution or statute. They further declared that the act of Congress limiting the power of federal courts to punish for contempt was binding upon all the inferior courts, but "whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, may perhaps be a matter of doubt." This position of the court appears to be illogical, because, if the inferior courts have the inherent or incidental right to punish for contempt and to disbar attorneys without such right being conferred by an act of Congress, how can the Congress take from the courts that right which they possess independently of its being conferred by Congress without destroying those courts? The court also pointed out the fact that the power to disbar attorneys is altogether different from the power to punish them and others for contempt, and that while "the law happily prescribes the punishment

which the court can impose for contempts," there is no statute limiting the power of judges to disbar attorneys, which depends wholly upon their discretion. Moreover, the courts rule that a proceeding to disbar an attorney is a civil proceeding, while a proceeding to punish for contempt is a criminal proceeding. When an attorney charges a judge with misconduct under such circumstances as prevent a proceeding to punish him for contempt, he can still be summoned before that judge in a proceeding to disbar him; and if he then attempts to justify by asserting the truth of his accusation, he must make his charges in court before that very judge, who can then presumably (this matter has not yet been decided), acting as prosecutor, judge and jury, both disbar the attorney and send him to jail or impose a fine within his discretion for contempt.

While not germane to the purpose of the present article, a most interesting question arises in connection with "contempt" in the Supreme Court. In construing the act of 1831, ex p. Robinson, *supra,* they declared that they (and all federal courts) possess the *inherent* or *incidental* authority to punish for contempt and disbar attorneys without obtaining such authority from Constitution or Congress. If that be so, it follows that this *inherent* right to impose punishment is unlimited (for instance, a fine may be imposed sufficient to exhaust the party's property and imprisonment practically equal to a life sentence), except as it may be limited either by the voluntary action of a majority of the court, or by constitutional or statutory enactment. If, now, the Congress has no authority to limit this power of the Supreme Court (conceding such authority as to all inferior courts), of which they declare there may be doubt, it becomes an interesting question, whether our forefathers, when they formulated the Constitution and put it into operation (followed almost immediately by ten amendments to safeguard most carefully their personal rights), with the determination foremost in their minds that no provision thereof should contain a menace to their liberty or their property, have actually established (by Constitution and Congress) at the seat of government a tribunal of nine

members, five of whom possess the *inherent* and *independent* power, first, to determine what acts or words they will deem a contempt of their authority or their dignity as judges, and, second, what amount of fine and what term of imprisonment they will impose upon the person who offends; and whether the people of the United States have deprived themselves of the right to limit this otherwise unlimited power of these five men (a majority of the tribunal), by act of Congress or in any other manner save by amendment of the Constitution. It is no answer to cite the provision prohibiting the infliction of cruel or unusual punishments, because the very men who would impose the punishment would thereby declare that it was not cruel and unusual for the offense of contempt of themselves. Neither is it an answer to say that the justices will never exercise this authority. The question is: Do they possess this power as an inherent or incidental right over the liberty and the property of every citizen of this country, independently of anything in the Constitution or in any statute? They have asserted that they do, and that there may be doubt about the authority of Congress to limit it.

Whence came this inherent or incidental power of federal judges to punish for contempts and to disbar attorneys whenever they feel that their judicial dignity has been offended or that their good faith or integrity has been questioned? For answer we must go to the dark ages of English jurisprudence. When the English kings, for several centuries following the Norman conquest, asserted that they ruled by divine right and made the people believe it, they appointed and removed judges at their pleasure and bestowed upon them just so much of their own divine authority as they deemed necessary to enable the judges to dispense the king's justice, without permitting encroachment upon his authority and prerogatives, and actually sat with the judges in the superior courts to assist them in arriving at correct decisions. The king did not allow judges to punish for contempts nor to disbar attorneys for offenses against themselves as judges, but only for offenses against his own sacred person; because, when the king was not

actually present in a superior court he was always constructively present, and, hence, an offense against such a court was a personal offense against the king. Now, the king did not deign to take his sacred person into any of the inferior courts, so that no offense against his person could be committed in any inferior court, and, hence, the judges of those courts had no authority to punish contempts nor to disbar attorneys.

There were special reasons why the king should give his judges these powers over attorneys. While some lawyers were always the most subservient tools of royal oppression, others were its bitterest foes and the most effective advocates of popular rights. In order that these troublesome lawyers might be held in check and their opposition to the king stifled, he gave his superior judges authority to punish them for contempt or to disbar them at their discretion, in his name and as his agents. That power which the English kings conferred upon their superior judges centuries ago the early colonial judges brought with them to America with the rest of the English legal system, and it was assumed as an inherent right by our federal judges at the organization of our government. (See *ante, re* act of 1789.)

Why should any federal judge have such authority to act as accuser, court and jury in his own cause with power to disbar and ruin the career of any attorney who offends him or who dares in good faith to expose what he has just ground for believing to be misconduct or even dishonesty on the judge's part? Why should not the attorney, at least if prepared to make an affidavit that the judge writing the opinion below was guided by ignorance, or by favoritism, or by dishonesty, have his charge tried before an impartial court and why should he not have a right to appeal to the Supreme Court or other competent and disinterested tribunal and have the right and merits of the judgment by which the tremendous penalty of disbarment and disgrace has been inflicted upon him passed upon, and not merely the question of whether a judge who has disbarred him had jurisdiction of the case? Congress has passed a statute

specifying those acts for which alone federal judges may inflict punishment as for contempts. Why should it not also limit the power of those judges by specifying those acts of attorneys which alone shall constitute causes for disbarment, and then only when the attorney's charges are proven to be groundless before an impartial tribunal? This is particularly pertinent in view of the following declarations of the Supreme Court:

"Happily the law prescribes the punishment which the court can impose for contempts."—(19 Wall. 512.)

"It is true that this remedy [mandamus, the only remedy against disbarment], even when liberally expounded, affords a far less effectual security to the occupation of attorney than is extended to that of every other class in the community."—(7 Wall. 376.)

It is undoubtedly the knowledge that they have this power to effect the disgrace and ruin of attorneys that makes judges so indifferent to criticism, and that makes lawyers so timid and often cowardly in exposing wrong or dishonesty in the federal courts. It rarely happens that lawyers will attempt to expose misconduct on the part of a judge until his conduct grows so rank that it smells across the continent. We need an independent judiciary, but the rights of citizens are dependent for their preservation equally, if not more, upon an independent bar, and an independent bar, if protected, will quickly expose favoritism and unfairness of the judges.

But somebody must expose the wrongs and injustice to and betrayal of inventors in the present system of administering the patent law, even at the risk of disbarment and disgrace. Patent counsel who have had long experience (not representing the big corporations) will remark frankly, when speaking under the seal of professional confidence: How seldom does it happen in certain courts that a poor man can win a patent suit; and they will also say, on learning that certain corporations are parties, without knowing anything of the merits: That corporation will win; simply on what they know of the strong call of those vested interests. But such counsel dare not say such things openly. Inventors are practically helpless and unable to make effective protest, for they are proverbially poor, wholly

unorganized and have no means of becoming organized. Recently the Inventors' Guild has suggested the appointment of a commission with a view of ultimately remedying present abuses and securing protection for inventors; but this guild is limited to a membership of about fifty of the more prosperous inventors of the country. The larger numbers of poor and struggling inventors have no means of protecting or of striving to protect their inventions from appropriation.

Under the Constitution the only way in which an unfair or dishonest federal judge can be punished is by the cumbrous and impossible method of inducing a majority of the House of Representatives to impeach him before the Senate, and then persuading two-thirds of the senators present to find him guilty, who often include among themselves the representatives of that same alliance between politics and big business to which many of the judges owe their appointments to the bench, and for whom, therefore, "impeachment is scarcely a scarecrow," as Thomas Jefferson declared. And in patent cases a judge can "throw" his decisions in favor of his friends and favorites for years and he would have a defense which, under the rule of resolving every doubt in favor of the accused, would often be accepted before a court or jury, for he would say: I am a layman and do not pretend to understand the technical matters involved in patent cases; but these matters are placed before me and I am compelled by law to decide them, and I do the best I can. A wealthy corporation can purchase "expert" testimony in unlimited quantity to support its pretensions, the motive therefor being (1) to confuse the mind of an honest judge and induce him to render a favorable decision by the greater quantity of such testimony, or (2) to furnish an excuse which a dishonest judge can assign for his favorable decision by declaring that he agrees with the "experts" (hired) of the defendant (or complainant). If conditions are to remain as at present, an inventor whose patent is being infringed should bring his action in the District of Columbia, if he can find acts of infringement committed there, for he can then appeal to

and have his patent finally construed by the Supreme Court, even though it will require perhaps five years to do so.

[The fact that, since the above statements were written, a federal judge has for the first time been impeached and removed from the bench for moral delinquency, does not make them any less applicable to the situation described.]

A REMEDY FOR PRESENT ABUSES

IT is useless to point out a wrong or an injustice in the administration of governmental affairs unless a remedy can be suggested that can be applied with reasonable ease and that will correct the wrong or mitigate the injustice. In the matter under discussion an adequate remedy for most of the wrong and injustice so apparent at present, which make it impossible for the great majority of inventors to protect their rights of which the Government by its solemn instruments under its seal has assured them, is immediately at hand, and the governmental machinery for putting it into operation is with modifications already in existence.

There is at Washington a Patent Office equipped with a physical plant which, although old and somewhat out of date and sorely in need of reconstruction and enlargement, is efficient. There is now in the United States treasury, which should be devoted to this purpose, a balance to the credit of the Patent Office of about $7,200,000. That office is under the management and direction of a corps of officials and experts who are devoting their lives to the work of studying all applications for patents and issuing patents to those entitled thereto. This body of men, whom we may call the Patent Office Force, constitutes probably the ablest and most expert body on all matters relating to patents and the scientific principles which underlie all the *subject-matter* of patents that can be found in the world. There is also in the Patent Office a court or division for determining who shall be entitled to the patent where two

or more persons are claiming a patent for the same invention. We may call this division the "Interference Court" in the Patent Office, for it has all the characteristics of a court. The issue between the parties is framed by the court (examiner). Each of the parties files a statement under oath (without seeing the other party's statement) as to when he made the invention, when he made a drawing of it, when he disclosed it to others, when he reduced it to practice, etc., and on these statements for pleadings the testimony of the parties is taken and the issues decided. And the questions decided in this "Interference Court" are exactly the same, and require the same knowledge and skill for their decision, as those decided in a court of equity in a suit for infringement of a patent. First, are the mechanisms of the two inventors that are described in their applications substantially the same? for if they are not, there can be no interference; and this is the same question that arises where the infringement of a patent is alleged. Second, did A make the invention before B, and has he used reasonable diligence in perfecting it? for, if so, he is entitled to the patent; and the same question must be decided in an infringement suit if the defendant asserts that another made the invention before the patentee. Third, was the apparatus on which a patent is sought in prior public use or is it disclosed in a prior patent, so as to defeat the right to a patent? and the same question must be decided by a court when the defendant tries to show an anticipation of the patent.

This "Interference Court" has adopted a system of rules for the taking of testimony, for the introduction of exhibits, for the hearing of all proper motions, for the argument of the cause and for necessary appeals, which for liberality of procedure and elimination of unnecessary red tape and expense might well be copied by all the federal courts from highest to lowest. The humblest citizen may address a letter to The Commissioner of Patents, making any possible inquiry relating to a matter of Patent Office practice, or to any phase of a pending case in which he is interested, and if he has the ability merely to make himself

understood he will receive a prompt and courteous answer; and if he desires advice as to how he shall proceed to protect his rights under stated circumstances it will be freely given. Considering the magnitude of the issues involved, which are often as great as those in the most important infringement suits, there is no doubt that this Interference Court is more ably and economically conducted and with greater liberality of procedure (notwithstanding an absurd number of appeals) than any court in the United States; and in all contests therein there is no person to whom the officials care so much to listen as to the inventor himself, for they realize that the man in whose brain the invention originated is best able to explain it. The writer has himself seen an ex-commissioner of patents ordered to hold his silence when interrupting and trying lawyer-like to confuse the explanations of an inventor in an interference contest. No costs are allowed in this court (until the case goes on appeal from the Patent Office to the Court of Appeals of the District of Columbia, a cumbrous proceeding, adding needless expense). So-called "expert" testimony is practically unknown and is never necessary, because the officials who decide the cases are themselves experts through years of constant devotion to their tasks. When such testimony is purchased the officials understand that it is done for the purpose of misleading them and give it no attention.

It is scarcely possible in an article like the present to do more than give the briefest outline of such changes in the present law and practice of the courts and in the organization of the Patent Office as should be made to eliminate much of the wrong and injustice now so transparent. These measures may be briefly summarized as follows:

1. Change the name and the organization of the Patent Office and make it both in fact and in name *The United States Patents Court.*

2. Give to this Patents Court complete and exclusive jurisdiction of all matters relating to patents both before and after their issue, including the examination and allowance of applications and the issue of patents, the decision of interferences, the repeal and cancellation of patents

erroneously or fraudulently obtained, and the decision of all suits for the infringement of patents.

(While speaking here only of patents, there appears to be no valid reason why trademarks and copyrights should not also be added.)

3. As part of this Patents Court the present machinery and corps of officials should remain substantially as at present for the examination of applications and the issue of patents and the decision of interferences, except as to appeals now too numerous. The force should be increased so as to insure prompt action on all applications.

4. As part of this Patents Court there should be a Board (Court) of Patents Appeals, to consist of seven (at least) members (judges), one of whom should act as its chief or presiding judge and five (at least) of whom should sit at the hearing of every matter presented for decision. As all necessity for so-called "expert" testimony would be eliminated, the judges themselves being experts, the records would be short and could be quickly read. The decision of this Patents Appeals Court should be absolutely final on all matters relating to patents except when the constitutionality of a law or the construction of a treaty is involved, or unless a stated number of the judges should certify specified questions of law to the Supreme Court, and these matters only should be submitted to that court for final decision.

5. There should be appointed such number of trial judges of said Patents Court as the work to be disposed of from time to time may require, to hear and decide in the first instance all suits for the cancellation or for the infringement of patents, as well as interferences. From the decision of the trial judge an appeal would lie to the Court of Patents Appeals, and their judgment would be final, except as pointed out above. Judges of the Appeals Court could be authorized to act as trial judges when not acting in the Appeals Court and trial judges could be assigned to sit in the Appeals Court when at least five of the appeals judges were not available through sickness or otherwise.

6. All appeals in matters relating to the issue of pat-

ents, the right of applicants to make given claims, interference contests, etc., should go directly to this Court of Patents Appeals from the tribunal first deciding the matter, or possibly to a Board of Examiners and then to the Appeals Court for final decision. Multiplicity of appeals is a curse to a poor man and puts him at a disadvantage with a rich adversary.

7. The commissioner of patents should be relieved of all judicial duties and he should be the administrative head of this Patents Court, which would give him all that one man should do, but he should be eligible for promotion to a judgeship.

8. In making appointments of judges of this Court of Patents Appeals the present commissioner of patents should be included (possibly others from the Office force), and their salaries should be at least equal to that of circuit or of district judges, that of the chief judge being the highest. Many, if not all, of the trial judges should be taken from the present Office force and their places should be filled by promotions from other positions in the Office. And the rule should be engrafted into the law and made absolute that hereafter all appointments to the force of this Patents Court and Patent Office must be made at the bottom, and all vacancies that occur in any branch or department thereof shall be filled by promotions from below, of which promotions a competent committee (or the Patent Appeals Court) shall have charge.

It is unnecessary for the present to go into further details, for the advantages that would follow are apparent. Trials of all matters would be in the hands at all times of competent experts, and thus all the present exorbitant expenses and delays, caused by the necessity of purchasing so-called "expert" testimony and which close the doors of the court rooms to practically all inventors, so long as they keep control of their patents, would be wholly avoided. If during the progress of a trial some abstruse or technical question arises, the experts in charge of that particular branch of the Office (Patents Court) could be appealed to and, being in the Government's employ, would give the

desired information impartially without added charge or expense, thus placing the rich corporation and the poor inventor upon an equality. Infringement suits could be finally decided within six months, if simple cases, and within a year no matter how complicated.

At present all hearings in interference contests, of which there have been 30,000 or more, are heard in Washington. In the system proposed it would be no hardship if all hearings in infringement suits were also heard in Washington; or the trial judges might be assigned to hold courts at such designated places and at such stated times as would suit the convenience of parties, just as district judges now hold court in several places within their districts, and these might include both interferences and infringement suits. Ordinarily the office of one of the attorneys would be a most convenient place for the first hearing, or a room temporarily engaged in a hotel would answer. Immediately after the hearing the exhibits could be forwarded to Washington, where they would remain for examination by the trial judge in writing his opinion and for use when the case comes before the Patents Appeals Court. No jury is competent to determine the technical issues in a patent suit, and if the option of a jury trial must be allowed for constitutional reasons it should be made necessary to bring it in one of the present district courts (the circuit courts having been abolished), and it should only be permitted on condition that all costs and disbursements be paid by the party demanding such trial.

The efficiency of the whole patent system and of the force having charge of its administration would be enormously increased. If all appointments to the force could be made only at the bottom and all vacancies in other positions could only be filled by promotions from below, every appointee would see before him from the outset the opportunity for a life career worthy of his best efforts, for he would have ever before him a series of promotions to positions of ever increasing importance, dignity and reward, with the ultimate goal a trial judgeship, an associate judgeship of the Patents Appeals Court, and finally the chief

judgeship itself of this Patents Court, and he would strive with the certainty in mind that the success and rapidity of his promotions would depend upon his own efforts and the fitness which he demonstrated, and that he could not be cheated out of his earned promotions by the appointment of some official favorite or political camp-follower. Salaries of $10,000 for the chief judge and of $9,000 for each of the associate judges of the Court of Patents Appeals would not be too large, for that court, in the amount and importance of the work devolving upon it and in the great public service which it would render in protecting and encouraging independent inventors, would be the most important court in the country, second only to the United States Supreme Court. How utterly we have failed to obtain the advantages which must always result from permitting a group of employees to earn promotion to the highest position of that group is illustrated in the facts that the present Commissioner of patents is the first to reach that office as a promotion from the office force at the time, and that but one other commissioner had ever had experience in the work of the office prior to his appointment as commissioner. All the other commissioners were appointed for political reasons for the most part, and, while some have been efficient, others have been models of mediocrity.

These opportunities would attract young men of the ablest talents and best education into this service. It would be desirable that only graduates of technical schools be appointed to the force, and they should also be graduates of a law school or should be required to complete such a course within a given number of years after appointment as a condition of being in the line of promotion to one of the judgeships. The salaries paid to the young men who begin their careers at the lowest positions in this Patents Court should be sufficient to attract to the service, not the culls of the technical schools, but their ablest graduates, and the scale of salaries should be readjusted throughout the entire force so as to assure them an increase of salary with each promotion sufficient under ordinary circumstances to retain them with their ever increasing efficiency in the serv-

ice. Any member of the force suspected of improper conduct or of favoritism would be put upon trial at once before the Patents Court and either acquitted or dismissed from the force if found guilty. To permit their being promptly dismissed for favoritism or misconduct, it might be advisable to make the trial "judges" referees rather than judges. If any member of the force should resign, he should be permitted to return only by beginning again at the lowest position. Favoritism should disappear and for the first time we could hope to see the patent law administered free from political or financial influence.

No radical changes in the law itself would be necessary, but such as are made should be with a view to protect and reward the inventors; and to this end a distinction should be made between the protection afforded a patent while it remains in the ownership of the inventor and the same patent after he has parted with all interest therein. When a patent is issued to one party and another proves that he was the first to make the invention and obtains his patent after an interference contest, the first patent should be recalled and either cancelled or reissued in a modified form, and questions decided in interferences should not, as at present, be litigated a second time. When any interested party asserts that a patent is void because it is anticipated by some prior patent or publication or by some apparatus in prior public use, let him move before the Patents Court to have the patent declared void and cancelled, but let him respect that patent meanwhile and not infringe it until his motion is finally decided in his favor. The defendant should be compelled to remove every doubt of infringement before being permitted to make an apparatus, unless he can demonstrate to the court by drawings or models that he devised his apparatus prior to the date of application of the patent. Under no circumstances should a wealthy corporation be permitted to defeat a patent by oral testimony as to the apparatus it was making or knew how to make at a given time that is inconsistent with or contradicted by its contemporaneous catalogs and circulars. At present, if the trial court holds that one claim of the patent

has been infringed and that another claim is void, the defendant can appeal at once, but the patentee cannot appeal until after the defendant's appeal shall be decided, rarely less than one or two years thereafter. This technical quibble of the practice should be eliminated.

In making the changes suggested and putting the new system into operation there is one danger point at the outset against which care must be taken. It would probably be necessary to appoint to this Patents Appeals Court a number of men whose only experience with patents has been as patent lawyers or as judges of the federal courts, and great caution must be shown lest that court be dominated at the outset by those who are ever willing to serve or to show favor to the large manufacturing trusts and corporations for favors received and for others expected. For several years there has been talk before Congress looking to the establishing of a special court at Washington to hear and decide all appeals in patent suits instead of having them heard by the nine circuit courts of appeals, as at present. The only advantage of such a court would be that all litigants in patent suits would have their appeals heard and decided by this *one* court instead of by the present *nine* circuit courts of appeals. But it would not aid the poor man a particle nor lessen his present burdens of delays and expense, because the cases must be prepared and heard before the trial court in the very same manner as at present, with all the delays, all the expenditures for "expert" testimony, for printing, certifying, etc. Indeed, it would rather add to the present burdens of poor litigants. Instead of establishing this proposed court, it would be far better to merely transfer for final decision all appeals in patent suits to the Court of Appeals of the District of Columbia and authorize that court to hear and decide such appeals instead of the present *nine* courts of appeals. That court has had much larger experience in patent matters, in connection with appeals in interference cases (the questions being substantially the same as in infringement suits), than any other court in the country.

President Taft's suggestion in a recent speech that he

hoped the Commerce Court would be made a court of appeals for all patent cases is most unwise. That court is composed of five circuit judges, each of whom serves five years, and he cannot be reappointed for one year thereafter. The chief justice of the Supreme Court must designate a new circuit judge to take the place of each retiring judge. Very few, if any, of these judges will have had sufficient experience to make them competent judges in patent cases, and as soon as a judge acquires some skill by five years' experience, he must give place to a new and inexperienced judge. The powerful manufacturing combinations will doubtless try to use all the influence they dare attempt to use to secure the appointment of their favorites to this court. Moreover, it will not lessen the delays and expenses of the present system a particle, nor afford a poor man the slightest assistance in upholding his patent.

Is it possible to effect such changes as will make the administration of the patent law independent and impartial, place the rich man and the poor man more nearly upon an equality and give every inventor assurance that he can have the merits of his invention and patent finally determined without prohibitive delays and expense by a court whose judges are under no obligation to politics or big business for their appointments or their promotions, are so expert in their knowledge of the matters to be decided that purchased testimony can be outlawed, and who are sufficiently numerous to prevent the possibility of a single member of the court deliberately "throwing" the decision in favor of some wealthy or political friend to whom he is either obliged or from whom he hopes for future favors? It may be taken as a certainty that no such change will be permitted by the large manufacturing corporations and trusts, if they can avoid it, unless they and their attorneys can feel that they can influence the appointment of judges to the Patents Appeals Court herein proposed on whom they can rely to protect their "vested" interests. They will doubtless prefer to retain the present system and establish one court at Washington to hear and decide all appeals in patent suits. That would retain the present system of expense and delays,

the purchasing of "expert" testimony, etc., which makes it impossible for the poor man to defend his rights. They will oppose even such a change from the present system unless they can feel assured that their interests are not to suffer. Nothing will aid the struggling inventor to maintain his rights short of an opportunity to go before a court of expert judges free from the influence of large business interests and qualified to understand his patent without "expert" testimony, thereby avoiding that huge expense.

NEW EQUITY RULES OF SUPREME COURT

THE new Rules of the Supreme Court for governing generally the practice in equity suits contain some admirable features, among which may be mentioned the following that must rid such suits of some immemorial driftwood. 1. "Unless otherwise prescribed by statute or these Rules the technical forms of pleading in equity are abolished." 2. "Demurrers and pleas are abolished." 3. "Exceptions for insufficiency of an answer are abolished." 4. "The court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." One marvels that these reforms were not adopted a century ago. And he also marvels, that while the Justices were about it, they did not abolish that other hoary technicality which declares that a court has no power to grant relief against an error or injustice in any suit, provided it had jurisdiction and the term of the court in which such error or injustice occurred has expired. There is scarcely a word in these Rules, however, that will aid a struggling inventor to uphold his patent, but certain provisions will add to his present handicaps, of which we can mention but few. The Rules declare that in patent suits "the district judge may, upon petition, order that the testimony in chief of expert witnesses * * * may be set forth in affidavits and filed" in court, instead of in the form of depositions. If the court grants such petition, it must then on motion order those witnesses to be produced for cross-examination

before the court upon the trial, or else their affidavits "shall not be used as evidence in the cause." This will be an added handicap. If the inventor lives in New York and has to bring his suit in Chicago or San Francisco, he would naturally have his experts in New York make their affidavits. If, then, he must on demand produce them at the trial in Chicago or San Francisco, it will add greatly to his expenses, and if he has only money enough to hire one expert who is too sick to attend, or dies meanwhile, or if for any reasons he cannot produce his "experts" in court, he will be thrown out of court because he has no expert testimony, or he must return home and begin again. The provision for taking depositions before stated examiners, instead of adopting the practice in use for decades in the Patent Office of allowing the counsel to take the testimony before any disinterested notary public on whom they can agree, will make an unnecessary expense. The provision requiring an abridgment or abstract of the record to be made to prepare it for the appellate court will necessitate an unnecessary expense for printing the entire record once and portions of it a second time. These Rules offer the independent inventor no substantial relief from the delays, expenses and other handicaps as set forth herein, which are incident to the necessity of depending for relief on the present federal courts.

RECENT ACTION BY CONGRESS

DURING the last Congress (1911-1913), an attempt has been made to secure such modifications in the laws as would further protect the inventors as well as the public. The Inventors' Guild (*ante*) suggested to the President the appointment of a commission to study the situation and recommend a course of action, who laid the suggestion before the Congress, with the result that the matter has been referred to the President's Commission on Economy, not one of whose three members has ever had experience with patents or patent litigation, nor has knowledge of the

real needs of inventors. The House Committee on patents after holding some hearings has introduced a bill designed principally to protect the public against corporations buying up a multitude of patents and suppressing them as a means of increasing its monopoly, and it has also made a report recommending other changes in the patent law. But it is safe to say that neither the bill nor the report of the committee contains any suggestion that will give the slightest added protection to the great army of independent inventors, nor lessen the handicaps under which they are now struggling. The committee's suggestion that the testimony in patent suits be taken in open court is futile. How can a judge inexperienced in the technical matters involved in patent suits and unable without the aid of hired experts to read and understand a patent and then make comparison between the apparatus described therein and another apparatus which is alleged to infringe the patent, tell who of conflicting experts on opposite sides is telling the truth by merely looking at the witnesses while they are testifying to what the judge confessedly does not understand? And how can he tell whether a question is relevant or material, or to what extent a cross-examination should go on a matter of which he confesses he is ignorant? He had far better read the testimony when he can study it at his leisure, and, if need be, consult some disinterested friend who is an expert as to the more difficult matters. Besides, if the trial judge does see and hear the witnesses tell their stories which he does not understand, how will that aid the judges of the appellate court who must decide the case finally by relying on what they read without hearing or seeing the witnesses? The inventors need and should have their rights determined by judges so competent that the necessity of hiring expert witnesses with the attendant expenses and delays can be wholly eliminated.

The suggestion of a patents appeals court is good so far as it goes, but that court should be one of experts, for reasons explained above. But the suggestion that the invention and patent be awarded to the first to file an application describing the invention in the Patent Office is alto-

gether wrong. One of the best provisions of the law at present (and for years past) is that which awards the patent to him who first *discloses* the invention to others, of which he must furnish competent evidence by drawings and witnesses, and gives the inventor two years, but no more as against a later inventor, to adapt and perfect his invention before filing his application, provided he meanwhile uses reasonable diligence therein. The Supreme Court has repeatedly commended this feature of the law as calculated to encourage inventors to perfect their inventions before applying for patents, instead of filing applications while the inventions are in their crude and immature stage. To deprive the independent inventors of this protection is to play into the hands of the big corporations. Often these men must struggle for years and deny themselves necessities in order to make a showing sufficient to enable them to raise funds to pay for filing applications for patents, or to enable them to live while perfecting their inventions to that point where applications are desirable. The big corporation, on the other hand, has a regular force of experts and attorneys, with every facility at hand, and as soon as an idea is suggested to the mind of one of them he can devote all the time necessary to develop it, calling to his aid his co-employees if need be, and an application for a patent can frequently be filed within a week. This is often done where these employees first learn of the invention from the drawings or descriptions of an independent inventor before his application is filed, or where they merely hear that an apparatus for a given purpose has been constructed without other knowledge, and then set themselves to work to devise some kind of apparatus to accomplish the same result (just as Galileo, having heard of the results obtained with a Flanders telescope, without seeing it or hearing it described, set himself to work and within a week constructed a telescope to duplicate or better the results of the other), and rush an application with some very broad claims into the Patent Office ahead of the first inventor for the very purpose of starting an interference and forcing the inventor to sell out to the corporation. The committee

says that the community is not interested in determining who was the first inventor. The real motive of all legislation should be to advance the public, not private, welfare, and protection should be given to inventors in order that they may be both enabled and encouraged to benefit the public. The inventor has no inherent or innate right to the exclusive use of his invention; such exclusive right is derived solely from the law and is a voluntary concession of society; and this is for two reasons. The first is that the inventor can derive no advantage or profit from his invention except such as he obtains from the public becoming his customers; and the second is that no individual member of society, let him strive with unceasing devotion and with all the ability he has, can give to society benefits that are at all commensurate with those which he receives from society. The community should be first of all interested in protecting and rewarding the real and first inventor who uses reasonable diligence and effort to give the public the benefit of his inventive ability in return for that protection and reward. If our law is framed with this particular end in view, there is no class in the entire community who will do more than inventors to protect the public from greedy exactions or give to the public a fuller measure of value for every effort made by the public to encourage and protect them.

We insert here an incident by way of illustration. A number of years ago a woman of highest credibility related to the writer an experience she once had in trying to collect some overdue rent from an inventor who occupied a small cottage in which she was interested in a nearby city of New Jersey. As the agent of the property was making no headway in collecting the rent, she determined to go herself and demand payment, and notify the inventor that unless he promptly paid the rent due and to fall due he and his family should be evicted. On arriving at the cottage she found the inventor with shoes removed sitting at his dining-room table, on which were books and papers and a mass of drawings and sketches in which he was deeply engrossed. Out of regard for his feelings she thought to introduce the

conversation by referring to his inventive work, and he thereupon began to explain to her the various inventions which he was striving to perfect, and told her what he had already accomplished, what he hoped to accomplish and the difficulties to be overcome. After listening to his conversation for more than an hour she became so completely fascinated by his story and so convinced of the great value of the work in which he was engaged that she lost her courage completely about demanding the rent and threatening eviction, and left the inventor's home without giving him the slightest indication of the purpose of her call.

Several decades passed by, and every newspaper in the land had become anxious to print anything that inventor might have to say upon any subject, for Fame had carried his name round the world. About the first of the year 1912 the New York Times sent a reporter to get an expression of his views as to what that year would have in store for the American people, and we quote a brief extract from that interview as reported:

"The worst thing about 1912 is the number of hoggish men it will have to tolerate, men, I mean who are so greedy that they'll starve an inventor so hard he can't work. The inventors can't produce. The men that handle [and appropriate] their inventions starve them. I tell you there is something wrong —deeply, sadly, fundamentally wrong—with our social system when so many greedy men ride the backs of the men who are producers."

The name of that inventor is Thomas A. Edison, most distinguished of living inventors, and even he realizes the gross injustice of present conditions. Future legislation should have for its aim to protect and encourage, not those inventors who are in the employ of corporations which own their inventions even before they are made, nor those whose successes have placed them in position to conduct long and expensive litigations if need be, but those who are struggling and willing to continue without ceasing for the public benefit if the public will afford them protection against the cormorants who now despoil them. We have no doubt of the sincere wishes of the members of the House Committee to reward independent inventors, but the difficulty lies in the fact that (as we understand) they have had little or no ex-

perience with patents and patent litigations, and particularly have they never been brought into relations with struggling inventors which have enabled them to appreciate the hardships under which they must often labor and the difficulties they must overcome.

CONCLUSION

THE injustice and wrong to poor litigants inherent in the patent law and its administration are but symptomatic of corresponding defects in other branches of the law, wherein the delays and expenses are so great that the ability of a poor litigant even to obtain a hearing often depends upon the friendship or the charitable consideration of the attorney. Indeed, our entire system of law and the machinery for administering justice are as a whole time-worn and archaic, and this is because they were largely formulated centuries ago through the influence of judges appointed by royalty to serve an aristocratic society whose political, social and economic conditions and beliefs differed radically in many respects from our own at the present time. There is little wonder that the people are thinking more seriously of these matters than ever before and are expressing louder and louder objections to the law and its administration, and particularly to those judges who owe their positions so largely to a combination of politics and big business, and from whom there has come since our government was established scarcely a suggestion (the Supreme Court deserve the highest commendation for their new Equity Rules) calculated to ameliorate present conditions or to place poor litigants more nearly on an equal footing with the rich.

While it is quite outside the main purpose of this article, we venture the prediction that the near future will witness great changes for the better in making and administering our laws, which will embody in particular the following elements:

1. *The democratizing of politics,* to the end that society

shall utilize the moral energy of all its adult members in the making of the laws, instead of excluding therefrom that half of such members to whom we are most indebted for our ideas of decency and right living, and that means shall be devised whereby society may give direct and effective expression to its will in the appointment of public officials and the conduct of public business and not permit that will to be thwarted by skillful manipulation of unfaithful "representatives."

2. *The democratizing of law and the administration of justice,* to the end that modern ideas of equity and morality, instead of time-worn and largely artificial rules of right (instead of "the ancient learning of the common law, its technical peculiarities and feudal origin, its subtle distinctions and artificial logic," 7 Wheaton, xvi), shall be recognized as the only proper basis of law, that the machinery of the courts shall be simplified, and their processes cheapened and quickened in the interests of poor litigants, and that judges, freed from obligations to politics and big business and bound to maintain such freedom as a condition of remaining on the bench, shall render their decisions with the sole purpose of effecting the desires of the public thought and the public conscience, the truest and most infallible guides which they can follow.

3. *The democratizing of industry,* to the end that the amount and value of living force expended in the production of wealth shall be as certainly ascertained, and even more carefully conserved, as are the amount and value of mechanical force, and that society shall find means to protect and promote what it is just beginning to recognize as its best interests by insisting upon a fair and just distribution of the profits of every business enterprise among all those who contribute of their living force to its success, instead of permitting a dozen or fifty men to appropriate to themselves out of such profits tens or hundreds of millions of dollars, while leaving thousands of workers on whose labor these profits principally depend so poorly off that six months' enforced idleness makes them unable to pay for living necessities.

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